

RULE 106. DEFENSES

(a) Defenses to be Asserted. Every defense, in law or fact, shall be asserted in the responsive pleading except that the following defenses may be asserted by motion: (1) lack of jurisdiction over the subject matter; (2) lack of jurisdiction over the person; (3) improper venue; (4) insufficiency of Process; and (5) insufficiency of Service of Process.

(b) Waiver or Preservation of Certain Defenses. A defense of lack of jurisdiction over the person, improper venue, insufficiency of process, or insufficiency of service is waived if omitted from a responsive pleading or not made by motion. Whenever the court finds that it lacks jurisdiction over the subject matter, the court shall dismiss the action.

Advisory Notes June 2008

Rule 106, subdivision (a) is derived from Rule 12(b). It is more limited than 12(b), addressing only those defenses that may apply to Family Division actions.

Subdivision (b) is based on Rule 12(h).

RULE 107. ORDERS PRIOR TO JUDGMENT

(a) Motions for orders prior to judgment. At any time prior to judgment in any action under this chapter in which the court has personal jurisdiction over the parties, the court may order the following:

- (1) parental rights and responsibilities for any minor children, including health insurance and child support;
- (2) appointment and payment of a guardian ad litem;
- (3) participation in a parental education program;
- (4) paternity testing;

- (5) psychological or other evaluations;
- (6) investigation by the Department of Health and Human Services pursuant to 19-A M.R.S. § 905;
- (7) possession of owned or rented real and personal property pending the final judgment;
- (8) payment of debts and obligations;
- (9) sale of any property of the parties, along with the disposition of the proceeds;
- (10) interim spousal support;
- (11) a job search;
- (12) payment by either party to the other or to the party's attorney of sufficient money for costs and counsel fees for the defense or prosecution of any action or any motion under this chapter. Execution for counsel fees shall not issue until after entry of final judgment;
- (13) prohibition of either party from imposing any restraint on the personal liberty of the other;
- (14) enforcement of compliance with the court's orders by appropriate process as the court can order in other actions; and
- (15) dissolution or modification of a preliminary injunction or an attachment or trustee process.

No orders prior to judgment may be entered without notice to the parties or upon motion. The motion may be accompanied by a draft order granting the relief requested.

In any action under this chapter in which the court lacks personal jurisdiction over the defendant, the court may at any time prior to judgment, and governed by the same notice provisions, enter any of the foregoing

orders that it deems proper that do not involve the payment of, or the allocation of responsibility for the payment of, money.

(b) Expedited Hearings. A party, or a guardian ad litem, may request that a hearing on a motion be expedited. Such requests shall be in the form of a motion for expedited hearing and shall demonstrate extraordinary circumstances in the particular case that justify an expedited hearing. The request for an expedited hearing shall be considered in light of all relevant factors, including:

(1) the court's ability to provide time for expedited hearing, and the effect on other cases awaiting hearing;

(2) the likelihood that denial of the motion for expedited hearing could have a substantial adverse effect on the best interest of a child or the parental rights of a party;

(3) the likelihood that denial of the motion for expedited hearing could have a substantial adverse effect on the health or financial standing of a party;

(4) the likelihood that denial of the motion for expedited hearing could have a substantial adverse effect on the court's ability to render a full and fair decision on any issue present in the case;

(5) any unreasonable delay on the part of the moving party in filing the motion;

(6) any conduct on the part of either party impairing a fair and just resolution of the issues.

The moving party must determine and report to the court whether any other party objects to the requested relief and the motion for expedited hearing. The motion shall contain a notice stating the time for a response to the motion. Responses to a motion for expedited hearing shall be filed in writing within 7 days of the notice of the motion.

The court may rule on a motion for expedited hearing without actual notice to other parties if the moving party has made a reasonable and good faith effort to notify the other parties or if delay would defeat the purposes of

the motion. No ruling granting substantive relief shall be made without notice and opportunity to be heard.

Advisory Notes
June 2008

Rule 107 is based on Rule 80(d) and 19-A M.R.S. §§ 105 and 904 relating to preliminary matters. It would also implement the recommendation of the Family Division Task Force to establish a procedure to seek an expedited hearing. It follows 80(d) with appropriate adjustments to fit it into the context of the Family Division Rules. The list of actions the court may take, as stated in 80(d), is separated out into individually numbered subparagraphs and some new categories of actions are added that reflect current practice and provide consistency with Rule 110A(b)(1) which is derived from FAM DIV III.A.1. The rule clarifies an uncertain issue as to whether the court has authority to order the sale of property pending a divorce as well as order the disposition of the proceeds. The new rule adds provision for appointment and payment of a guardian ad litem, as presently found in Rule 80(e).

This rule does not change the current practice before the magistrates that permits an oral motion for an order prior to judgment. The sentence requiring the filing a child support affidavit when child support is an issue is deleted because that language is provided by Rule 108.

Rule 107 deletes the language found in Rule 80(d) that provided for a hearing 7 days after a party had notice of a motion. It was deleted because no substantive standard existed for considering that motion, and the procedure was seldom used. The rule substitutes a requirement for a written response within 7 days of notice of the motion, leaving scheduling of any hearing to the court. The rule also outlines criteria to grant a request for an expedited hearing if the circumstances of the case warrant immediate court intervention.

**RULE 108. CHILD SUPPORT AFFIDAVITS AND WORKSHEETS,
FINANCIAL STATEMENTS, AND REAL ESTATE CERTIFICATES**

(a) Child Support Affidavits.

(1) In any proceeding under this chapter in which child support is an issue, the parties shall exchange and file child support affidavits. Except for actions initiated by the Department of Health and Human Services, the party initiating the action shall serve and file a completed child support affidavit with the complaint, petition or motion. The responding party shall file a completed child support affidavit with the response or appearance but no later than the case management conference.

(2) If the Department of Health and Human Services seeks to initiate or modify a support order and is unable to secure the affidavit of a custodial parent who is in receipt of public assistance, the Department may submit an affidavit based upon its information and belief regarding the custodial parent's income.

(b) Child Support Worksheets. In any proceeding under this chapter in which child support is an issue, the court may, at any time, order the parties to file child support worksheets.

(c) Financial Statements. In any divorce or judicial separation action in which there is a dispute about either a division of property or an award of spousal support or counsel fees, the parties shall exchange and file a financial statement showing the assets, liabilities, and current income and expenses of both parties and indicating separately all marital and nonmarital property. The financial statement shall be filed within 21 days of the Family Division Scheduling Order or before mediation, whichever is earlier.

(d) Miscellaneous requirements.

(1) Financial statements, child support affidavits and child support worksheets shall be filed on court approved forms that are published by the court.

(2) All child support affidavits and financial statements shall be signed by the party under oath.

(3) Any financial statement or child support affidavit filed shall be kept separate from other papers in the case and shall not be available for public inspection, but shall be available, as necessary, to the court, the attorneys whose appearances are entered in the case, the parties to the case,

their expert witnesses, and public agencies charged with responsibility for the collection of support.

(e) Real Estate Certificates. In every divorce action in which any party has an interest in real estate, the parties shall file with the court, at least 3 days before the hearing, the following information on the court approved form: the book and page numbers of an instrument describing the real estate; the applicable Registry of Deeds; and the town, county and state where the real estate is located.

(f) Sanctions.

(1) If a party fails to file any child support affidavit, child support worksheet, financial statement, or real estate certificate required by these rules, the court may make such orders in regard to such failure as are just, including imposition of sanctions, as appropriate, including but not limited to sanctions set forth in Rule 37(b)(2). However, a magistrate may not impose any sanctions or penalties based upon a determination of contempt under Rule 66.

(2) A child support order shall be entered notwithstanding a party's failure to file a child support affidavit. If a party fails to file a child support affidavit without good cause, the court may take any of the following actions:

A. Set that party's gross income in accordance with:

(1) The statutory minimum wage for a 40-hour work week;

(2) Maine Department of Labor statistics;

(3) An affidavit submitted by or testimony of the opposing party;

or

(4) Information included in that party's most recent federal income tax return.

B. Enter an order requiring that party to release all requested information to the court. Failure to comply with the order may result in a finding of contempt punishable by a fine or jail sentence.

C. Award attorney fees.

**Advisory Notes
June 2008**

Rule 108 addresses the requirements for filing child support affidavits, child support worksheets and financial statements as found in Rule 80(c) and real estate certificates found in Rule 80(j). Under subdivision (a), child support affidavits must be filed in all cases where child support is an issue. Child support is always an issue in original actions such as a divorce involving minor children, parental rights and responsibilities actions and parentage and paternity actions. This is a departure from the current rule that requires that child support affidavits be filed in every action involving a minor child. The prior rule was broader than the statute, 19-A M.R.S. § 2004(1)(A). The committee believes that in many post-judgment proceedings, such as enforcing and modifying contact rights, child support affidavits are not necessary.

Rule 108 interfaces with Rule 112 because one of the original purposes for requiring the filing of the child support affidavit was to reduce discovery. Rule 112 provides the authority for the court to order the parties to file child support affidavits when not required by Rule 108. Accordingly, when the court (primarily magistrates who have discussions with the parties at conferences) determines that child support should be reviewed, the court can order the parties to file child support affidavits.

Subdivisions (a) (1) and (2) include the qualification and exemption of the Department of Health and Human Services from such filings provided by FAM DIV III.A.2.

Subdivision (b) departs from the prior requirement that parties must file child support worksheets. The experience of magistrates who handle virtually all of these cases suggests that the initial required worksheets are frequently neither filed nor useful to the court. This rule deletes that requirement but permits the court to order the filing of worksheets.

In *Lawrence v. Webber* 2006 ME 36 ¶ 3 n.4, 894 A.2d 480, the Law Court noted that the trial court may have been aided had the parties filed child support worksheets as required by 19-A M.R.S. § 2004(1)(C). The

magistrates, however, are in a better position to know the appropriate time to order the parties to file worksheets, which will usually be before hearings and conferences. The court now has available software programs that perform worksheet calculation functions upon entry of appropriate income and other figures.

In subdivision (c), financial statements must be filed in all divorce or judicial separation actions where division of property, spousal support, or counsel fees is an issue. The rule is developed from Rule 80(c). Rule 80(c), however, neither limits the requirement for filing of financial statements to divorce and judicial separation actions nor includes counsel fees as an issue. In practice, however, financial statements are filed only in the two original actions. Also, the court-approved financial statement form refers to counsel fees. Rule 108 interfaces with Rule 112 because the filing of the financial statement triggers discovery. In practice, financial statements were not filed in post-judgment motions or parental rights and responsibilities complaints so that triggering discovery with the filing of the financial statement does not make sense. The committee believes that the rule should reflect practice. Division of property is only an issue in original actions. Although spousal support and counsel fees may be issues in both original actions and post-judgment motions, Rule 108 requires that the financial statement be filed only in the original action, which is the current practice. Rule 112 provides that the court, on its own motion or at the request of the parties, may order the filing of financial statements in any proceeding under this chapter in which it would assist in discovery or otherwise be appropriate.

Subdivision (c) also changes the time period for filing the financial statement. Often in practice, the financial statement was exchanged at mediation which does not adequately permit the parties to prepare for mediation. The filing of the financial statement shall be ordered in the Family Division Scheduling Order to be within 21 days of the date of the order or before mediation, whichever is earlier. Finally, subdivision (c) also provides the court with authority to shorten or lengthen the time period for filing the financial statement as appropriate.

Subdivision (d) outlines other miscellaneous requirements located in Rule 80(c).

Subdivision (e) relating to filing a real estate certificate is included in Rule 108 so that all required supplemental financial and asset filing requirements are contained within one rule.

Subdivision (f) relates to actions the court may take if there is a failure to file required materials. Subsection (f) (1) is based on Rule 80(c). It indicates that if a party fails to file any required affidavit, worksheet, financial statement, or real estate certificate required by this rule, the court may make such orders in regard to the failure to file as are just, including the imposition of sanctions as appropriate. The rule clarifies that magistrates are not permitted to impose any sanctions or penalties based upon a determination of contempt under Rule 66.

Subdivision (f) (2) is based on FAM DIV III.H.2. It authorizes entry of child support orders notwithstanding a party's failure to file affidavits and sets the process by which the court may determine income levels for assessment of child support. It also allows the court to impose certain obligations for filing upon non-cooperating parties and it allows award of attorney fees. All of this is as provided in FAM DIV III.H.2.

RULE 109. FAILURE TO APPEAR; SANCTIONS

If, after proper notice, a party fails to appear at a case management, pretrial or status conference, mediation or a hearing, without good cause, the court may take appropriate action, including but not limited to, issuing an interim, status conference or pretrial order, or a default or a default judgment as provided in Rule 117. If, after proper notice, the moving party fails to appear at a case management, pretrial or status conference, mediation or a hearing, without good cause, the moving party's complaint, motion or other pleading may be dismissed by the court with or without prejudice. Costs may be awarded as allowed by these rules, as well as the cost of mediation, and reasonable attorney fees.

Advisory Notes June 2008

Rule 109 outlines the actions a court may take if a party fails to appear at a proceeding. It follows FAM DIV III.H.1. The rule refers to Rule 117 regarding default judgments.